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MAY 1964
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. [redacted] 77

FEDERAL CARTRIDGE CORPORATION,
Appellant,
VERSUS
THE SUPERIOR COURT OF CREEK COUNTY, BRISTOW DIVISION, and THE HONORABLE G. B. CORYELL, Judge of said Court, and FRED ESPY and GENE SEARS,
Appellees.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

STATEMENT AS TO JURISDICTION

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April, 1964.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

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In the
Supreme Court of the United States
OCTOBER TERM, 1963

No. .....

FEDERAL CARTRIDGE CORPORATION,
Appellant,

VERSUS

THE SUPERIOR COURT OF CREEK COUNTY, BRISTOW DIVISION, and THE HONORABLE G. B. CORYELL, Judge of said Court, and FRED ESPY and GENE SEARS,
Appellees.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

STATEMENT AS TO JURISDICTION

Appellant, Federal Cartridge Corporation, appeals from the order of the Supreme Court of Oklahoma in Cause No. 40717 denying a rehearing on an Application to Assume Original Jurisdiction and a Petition for Writ of Prohibition, and submits this statement in support of its position that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

There was no opinion written by the Supreme Court of Oklahoma. A copy of the orders of the Court are attached hereto as Appendix A.

JURISDICTION

1. This action was brought under Article 7, Section 2 of the Oklahoma Constitution requesting the Supreme Court of Oklahoma to assume original jurisdiction and grant a writ of prohibition to prohibit the Judge of the Superior Court of Creek County, Oklahoma, Bristow Division, from entertaining further proceedings in Cause No. 5984 filed in that court (R. 1-3).

2. The Supreme Court of Oklahoma handed down its order December 16, 1963, denying the writ of prohibition requested (R. 70). Appellant then petitioned the Supreme Court of Oklahoma for a rehearing. After requesting Appellees to respond to said petition for rehearing, the Supreme Court of Oklahoma denied said petition on March 10, 1964 (R. 95). Notice of appeal to this Court was filed with the Clerk of the Supreme Court of Oklahoma on March 25, 1964 (R. 96-99).

3. The jurisdiction of this Court on appeal is conferred by 28 U.S.C.A., Section 1257(2). Appellant challenges the validity of the order of the Supreme Court of Oklahoma in its interpretation of Title 18, Section 1.204(a) of the statutes of the State of Oklahoma, as amended, and maintains that as applied to Appellant, that order constitutes a denial of the equal protection of the laws guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

4. Cases to sustain the jurisdiction on this Court on appeal include *Madruga* v. *Superior Court of State of California, in and for San Diego County* (Cal. 1954), 74 S.Ct. 298, 346 U.S. 556, 98 L.Ed. 290; *Dahnke Walker Milling*

Company v. *Bondurant*, 42 S.Ct. 106, 257 U.S. 282, 66 L.Ed. 239; *Wilson* v. *Cook*, 66 S.Ct. 663, 327 U.S. 474, 90 L.Ed. 793; *Bantam Books, Inc.* v. *Sullivan*, 83 S.Ct. 631, 373 U.S. 58, 9 L.Ed.2d 584; *Weston* v. *City Council of Charleston*, S.C., 1829, 27 U.S. 449, 2 Pet. 449, 7 L.Ed. 481; *Bondini Pet. Co.* v. *Superior Court of State of California* (1931), 52 S.Ct. 103, 284 U.S. 8, 76 L.Ed. 136; *Metlakatlo Indian Community, Annette Island Reserve* v. *Egan* (Alaska 1960), 80 S.Ct. 1321, 363 U.S. 555, 4 L.Ed.2d 1397; *Horwitt* v. *Horwitt*, 90 F. Supp. 528.

5. A copy of Title 18, Section 1.204(a) of the Statutes of the State of Oklahoma, the "statute" involved within the meaning of 28 U.S.C.A., Section 1257 (2), is attached hereto as Appendix B. That part of the statute which is in issue, is as follows:

> ". . . In all cases where a cause of action has accrued or shall accrue to any person by reason of a foreign corporation doing business in this state or having done business in this state, or while a foreign corporation was doing business within this state and such foreign corporation has no registered agent in this state upon whom service of summons or other process may be had, an action may be filed against such foreign corporation in any county in the state and service of summons or other process may be had upon the Secretary of State, and such service shall be sufficient to give jurisdiction of the person to any Court in this state having jurisdiction of the subject matter whether sitting in the county where the Secretary of State is served or elsewhere in this State. . . ."

QUESTIONS PRESENTED

1. Whether Title 18, Section 1.204(a) of the Statutes of the State of Oklahoma as amended, as interpreted by the Supreme Court of the State of Oklahoma in the case at bar, constitute a denial of the equal protection of the laws as guaranteed to Appellant by the Fourteenth Amendment to the Constitution of the United States?

2. Whether the section of the Oklahoma Statutes quoted in Paragraph 1 above as interpreted by the Oklahoma Courts in the case at bar is in violation of Article 9, Section 43 of the Constitution of the State of Oklahoma, which is attached hereto as Appendix C, and which provides in part as follows:

> ". . . service of summons or legal notice may be had on such designated agent and such other agents as now or may hereafter be provided by law. Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found or in the county of the residence of the plaintiff or in the county where the cause of action may arise . . ."

and thus constitute a denial of equal protection of the laws guaranteed to this Appellant by the Fourteenth Amendment to the Constitution of the United States.

OTHER STATUTES INVOLVED

Title 18, Section 471 O.S.A.; Title 12, Section 137 O.S.A.

STATEMENT

1. The Nature of Appellant's Activities

Appellant, Federal Cartridge Corporation, is a corporation organized and existing under and by virtue of the

laws of the State of Minnesota, and is not domesticated in the State of Oklahoma. During the times pertinent to this action, it was not doing business within the terms of the Oklahoma Statutes and decisions which require that it domesticate.

The Appellee, Superior Court of Creek County, Bristow Division, and the Honorable G. B. Coryell, Judge of said court, is the trial court in which suit was originally filed and is now pending.

Appellee, Fred Espy, is a resident and citizen of the State of Oklahoma, residing at Watonga in Blaine County, Oklahoma.

Appellee, Gene Sears, is a citizen and resident of the State of Oklahoma, residing in El Reno in Canadian County, Oklahoma, and is engaged in the business of selling, among other things, shotgun shells, and furnishing other related services. The said Gene Sears is not an agent, servant or employee of Appellant.

Appellee, Fred Espy, has filed an action in the Superior Court of Creek County, Bristow Division, Oklahoma, seeking to recover damages for alleged personal injury sustained as a result of the explosion of a shotgun shell claimed to have been provided to him by the said Gene Sears and claimed by him to have been manufactured by the Appellant.

In the said action, personal service was had upon Appellee, Gene Sears, in Canadian County, Oklahoma, and purported service of summons was had on Appellant by serving the Secretary of State of the State of Oklahoma.

After the service of summons, Appellant filed in the said Superior Court of Creek County, Bristow Division, Oklahoma, its Special Appearance, Denial of Jurisdiction and Objection to Venue, Motion to Quash, and Motion Forum Non Conviens, accompanied by affidavit wherein it set out, among other things, that it is not admitted to do business in the State of Oklahoma, that the respondent, Gene Sears, is not an agent or employee of Appellant; that Appellant does not do business in Creek County, Oklahoma, within the applicable statutes and that no debts are owing to it in Creek County (R. 18). This question was again raised in a subsequent motion and the Superior Court again overruled the motion (R. 19-20). By these actions, the said Superior Court has indicated that it will require Appellant to proceed to trial in said cause in said court.

2. Action in State Supreme Court

Pursuant to the provisions of Oklahoma Statutes, Appellant filed an application in the Supreme Court of Oklahoma requesting it to assume original jurisdiction and grant a Writ of Prohibition prohibiting the Superior Court of Creek County, Oklahoma, from proceeding further in the cause. The position of the Appellant is that Title 18, Section 1.204(a) O.S.A., as applied to it, is unconstitutional in that it violated the Fourteenth Amendment to the Constitution of the United States since it does not afford equal protection of the laws and discriminates against foreign corporations in arbitrarily fixing venue against Appellant in any of the 77 counties in the State of Oklahoma.

On December 16, 1963, the Supreme Court of Oklahoma issued its order denying the applications of Appel-

lant for Original Jurisdiction and Writ of Prohibition. Three members of the Court dissented.

On Petition for Rehearing, Appellant argued that the order and decision of the court deprives Appellant of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and that the order was in conflict with Article 9, Section 43 of the Constitution of the State of Oklahoma, and as applied to Appellant constituted a violation of the Fourteenth Amendment to the Constitution of the United States in depriving Appellant of the equal protection of the laws.

On March 10, 1964, the Supreme Court of the State of Oklahoma issued its order denying the rehearing. To which order one member of the Court dissented.

THE FEDERAL QUESTION IS SUBSTANTIAL

1. The Order, as applied to Appellant, is a violation of the Fourteenth Amendment to the Constitution of the United States since it deprives Appellant of the equal protection of the laws in that a different rule in regard to venue was applied to defendant, a foreign corporation, than is applied to domestic corporations.

It has been held by this Court that State Supreme Court judgments finally disposing of a writ of prohibition are final judgments reviewable in this Court under 28 U.S.C.A., Section 1257(2). *Madruga* v. *Superior Court of State of California in and for San Diego County*, Cal. 1954; 74 S.Ct. 298, 346 U.S. 556, 98 L.Ed. 290; *Weston* v. *City Council of Charleston*, S.C. 1829, 27 U.S. 449, 2 Pet. 449, 7 L.Ed. 481.

The Fourteenth Amendment to the Constitution of the United States provides in part as follows:

> "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In order for a statute to give a foreign corporation the equal protection of the laws with a domestic corporation, if there is a distinction made in said statute as between them, there must be some reasonable basis on which to make a classification.

We submit to the Court that no such reasonable basis for classification exists here and none has been suggested. Accordingly, to say that this petitioner can be sued in any of the 77 counties of the State of Oklahoma, when domestic corporations can be sued only in those counties where venue is properly fixed by reason of the facts, is in effect to deprive this petitioner of certain of its property rights without due process of law, and to deny to it the equal protection of the laws of the State.

It is Appellant's position that it is not doing business within the State of Oklahoma. However, regardless of whether it was doing business in the State of Oklahoma, the Superior Court of Creek County is not the proper venue of this action. That fixing venue in that court constitutes discrimination against Appellant as a foreign corporation and is a violation of Appellant's rights to equal protection under the laws within the Fourteenth Amendment of the United States Constitution.

The applicable statutes in this case are as follows:

Title 12, Section 137, O.S.A., which provides:

> "In addition to the other counties where an action may be brought against a non-resident of this State or a foreign corporation, such action may be brought in any county in which there may be debts owing to such defendant, or where such defendant may be found; if such defendant be a foreign insurance company, the action may be brought in any county where such cause of action, or where any part thereof, arose, or where the plaintiff resides or where such company has an agent."

Title 18, Section 1.204(a), O.S.A., as amended by the 1961 Legislature, provides in part:

> ". . . in all cases where a cause of action has accrued or shall accrue to any person by reason of doing business in this state or having done business in this state or while a foreign corporation was doing business within this state and such foreign corporation has no registered agent in this state upon whom service of summons may be had, an action may be filed against such foreign corporation in any county in the state and service of summons or other process may be had upon the Secretary of State, and such service shall be sufficient to give jurisdiction of the person to any court in this state having the jurisdiction of the subject matter whether sitting in the county where the Secretary of State is served or elsewhere in this state."

It appears that this is the only Oklahoma statute which could operate to fix venue of this action in Creek County. Since this is the case it is important to a determination of this question that the above quoted language be compared

with the language of Title 12, Section 132, O.S.A., which relates to venue of actions against domestic corporations. This section provides in part as follows:

> ". . . an action other than one of those mentioned in the first three sections of this article against a corporation created by the laws of this state, may be brought in the county in which it is situated or has its principal place of business, or in which any of the principal officers thereof reside, or be summoned, or in the county where the cause of action or some part thereof arose . . ."

Article 9, Section 43 of the Constitution of the State of Oklahoma provides, among other things, for service insofar as foreign corporations are concerned and for place of suit. In this regard this constitutional provision states:

> ". . . service of summons or legal notice may be had on such designated agent and other agents are now or may hereafter be provided by law. Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found, or in the county of the residence of the plaintiff, or in the county where the cause of action may arise."

Title 18, Section 471, O.S.A., entitled "Venue of Action" reads as follows:

> "Any foreign corporation, doing business in the state of Oklahoma and any person now or hereinafter having any cause of action against any corporation, arising out of contract tort or otherwise may file suit in any court of the state of Oklahoma where the plaintiff resides or where said corporation has its principal place of business, or has an agent appointed upon whom service of summons or other process may be had."

In the case of *Continental Oil Company v. Wheat*, 162 Okla. 11, 132 P.2d 947, the Oklahoma Supreme Court held:

> "The venue of actions against foreign corporations is prescribed by the constitution, Section 43, Article 8, and Statute 18 OS 1941, Sec. 471, and 12 OS 1941, Sec. 137, and lies only in those counties where either the plaintiff resides, the cause of action arose, the corporation has its principal place of business, or has property, or where the corporation has an agent upon whom service of summons or other process may be had."

The Oklahoma Court further held in that case:

> "When action has been brought against a foreign corporation in a county in which neither the plaintiff resides nor the cause of action arose, and where the corporation neither has its principal place of business, nor property, and has no agent upon whom service of summons or other process may be had, there is an absence of the necessary venue, and when this appears, the action should be dismissed."

By its order in this case, the Court is taking the position that 18 O.S.A. 1.204 authorizes a suit to be filed against a foreign corporation which has no resident agent in any of the 77 counties. The Legislature could have had no such intention and must have intended that 18 O.S.A. 1.204(a) be read in conjunction with Article 9, Section 41 of the Oklahoma Constitution, which specifically states where suits may be brought against foreign corporations, to-wit: (1) The county where an agent of such corporation may be found; (2) the county of the residence of the plaintiff; or (3) in the county where the cause of action arose. To hold otherwise would make Title 18, O.S.A. 1.204(a) repugnant

to Article 3, Section 41 of the Oklahoma Constitution and unconstitutional.

In this case the petitioner did not have a service agent in this State on whom service of summons could be had. To remedy this situation, the Legislature provided in 18 O.S.A. 1.204(a) that the service agent of such a foreign corporation should be the Secretary of State. We submit to the Court that the statute relied on by respondent is primarily a statute in regard to service. The article of the Constitution of Oklahoma, above referred to, states in part:

> ". . . service of summons or legal notice may be had on such designated agent and such other agents as now or *may hereafter be provided for by law.*"

18 O.S.A. 1.204(a) thereafter provided that the Secretary of State shall be the service agent for a foreign corporation which fails to designate an agent. 18 O.S.A. 1.204(a) could not change the place where a suit may be maintained against a foreign corporation because there is a specific constitutional provision in regard thereto (Article 8, Section 43, Oklahoma Constitution).

It is to be noted that Title 18, O.S.A., Sec. 1.204(a) contains the following provision in regard to the question of jurisdiction:

> ". . . service of summons or other process may be had upon the Secretary of State and such service shall be sufficient to give jurisdiction of the person *to any Court of this State having jurisdiction of the subject matter . . .*"

It is submitted that the italicized phrase was used in the statute by the Legislature in its broadest sense insofar

as jurisdiction is concerned, and that it includes proper venue of the action. Otherwise the Legislature would have had no purpose in placing that phrase in the statute. The statute would have made sense and provided for what respondent urges here if that phrase had not been used. Any other interpretation of the italicized phrase of the statute above quoted is in direct conflict with the Constitution as heretofore pointed out.

The Oklahoma Supreme Court, in applying Title 18, Section 1.204(a) O.S.A., as construed with the other statutes above set out, and the Constitution of the State of Oklahoma, discriminates against Appellant as a foreign corporation and makes it subject to suit in any of the 77 counties of the State of Oklahoma. Domestic corporations and foreign corporations who have service agents in the State are amenable to suit in only certain specified counties (Title 18, Section 471, O.S.A.).

In a factual situation quite similar to the case at bar, this Court in *Power Manufacturing Company* v. *Saunders*, 274 U.S. 490, 47 S.Ct. 678, held that a statute purporting to fix venue in actions against foreign corporation in any county in the State was unconstitutional since it did not afford equal protection of the laws. In that case, plaintiff sought recovery for personal injuries sustained while in the employ of defendant. Both plaintiff and defendant were residents of Ohio. Defendant qualified to do business in Arkansas and maintained a warehouse at Stuttgart, Arkansas, in which plaintiff was injured. Plaintiff brought suit in Salina County and sought service by serving defendant's designated service agent in Stuttgart (not in Salina County). Defendant had no other agent or other business

in Arkansas. Plaintiff obtained judgment affirmed by the Supreme Court of Arkansas. Defendant brought Writ of Error in the United States Supreme Court. At that time Arkansas had one statute which fixed venue in actions brought against domestic corporations in the county where the corporation had its place of business or where its chief officer resided. Another statute purported to fix venue in actions against foreign corporations in any county in the State. In holding the latter statute unconstitutional as violating the Fourteenth Amendment, this Court said:

> ". . . We think it very plain that the statutes discriminate against foreign corporations and in favor of domestic corporations and individuals, and that the discrimination is not theoretical merely, but real and substantial.
>
> ". . . The clause in the Fourteenth Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws . . . It does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary but based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation . . ."

When the statute here in question, Title 18, Section 1.204(a), O.S.A., is given the meaning placed on it by the Supreme Court of Oklahoma, it is clearly within the prohibition announced in the *Power Company* case, *supra*.

In the *Power* case, *supra*, there was involved a corporation licensed to do business and having a resident agent in the State of Arkansas; however, this would not appear

to create any difference whatever with respect to the application of the rule announced by this Court, since in the case at bar assuming that Appellant is amenable to process in Oklahoma, the plaintiff has the opportunity to bring the action in a court in which venue properly lies by simply bringing the action in the county in which the Secretary of State may be served; the county of residence of the plaintiff; or the county in which the cause of action arose, none of which in this case happens to be Creek County. In each of the above counties there exists some reasonable connection or contact with either the plaintiff, the defendant, the subject matter of the cause of action or the place where the service agent, in this case the Secretary of State, may be served. In Creek County there is no connection with any party to the action, with the cause of action or with any service agent.

In applying Title 18, Section 1.204(a), O.S.A., to this Appellant, the Oklahoma Supreme Court denied Appellant equal protection of the laws as guaranteed to it by the Fourteenth Amendment of the United States Constitution, since there is no basis on which to make a reasonable classification between this foreign corporation, domestic corporations and admitted foreign corporations.

The right to sue and be sued in a certain place is a valuable property right. By holding that a foreign corporation can, merely on the allegation of the plaintiff that it is doing business in the State without naming a service agent, be sued in any county in the State is far reaching and affects all foreign corporations. The question involved here is therefore substantial. This practice has been condemned by this Court as being discriminatory and as vio-

lating substantial rights guaranteed to all by the Fourteenth Amendment to the Constitution of the United States. (*Power Co. v. Saunders, supra.*)

CONCLUSION

On the basis of the above discussion, Appellant submits that this appeal involves federal questions under the Constitution of the United States that are far reaching and important and are of such substantial quality as to require plenary consideration of briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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April, 1964.

APPENDIX

APPENDIX A

Filed
In Supreme Court
of Oklahoma
Dec. 16, 1963
ANDY PAYNE, CLERK.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Federal Cartridge Corporation,
Petitioner

vs NO. 40717

The Superior Court of Creek County,
Bristow Division, and Hon. G. B.
Coryell, Judge of said court, and
Fred Espy and Gene Sears,
Respondents

ORDER

It is hereby ordered that the application to assume original jurisdiction and grant writ of prohibition be, and the same is denied.

DONE BY ORDER OF THE COURT IN CONFERENCE THIS 16th day of December, 1963, Welch, Williams and Berry, JJ: dissenting.

W. H. Blackbird, C.J.

Filed
In Supreme Court
of Oklahoma
Jan. 14, 1964
ANDY PAYNE, CLERK.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, January 14, 1964.

NOTICE: EXTENSIONS OF TIME TO BRIEF WILL HENCEFORTH BE LIMITED.

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS:

40717—Federal Cartridge Corporation v. Superior Court of Creek County. Defendant in error is directed to respond to petition for rehearing within fifteen days from this date.

W. H. Blackbird,
Chief Justice

ATTEST: Andy Payne, Clerk.

Filed
In Supreme Court
of Oklahoma
Jan. 28, 1964
ANDY PAYNE, CLERK.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, January 28, 1964

NOTICE: EXTENSIONS OF TIME TO BRIEF WILL HENCEFORTH BE LIMITED.

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS:

40717—Federal Cartridge Corporation v The Superior Court of Creek County, etc. et al. Respondents granted until February 8, 1964, to respond to petition for rehearing.

W. H. Blackbird,
Chief Justice

ATTEST: ANDY Payne, Clerk.

Filed
In Supreme Court
of Oklahoma
March 10, 1964

ANDY PAYNE, CLERK.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, March 10, 1964

NOTICE: EXTENSIONS OF TIME TO BRIEF WILL HENCEFORTH BE LIMITED.

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS:

40717—Federal Cartridge Corporation v The Superior Court of Creek County. Rehearing denied. Berry, J. Dissenting.

Harry L. S. Halley,
Vice Chief Justice.

APPENDIX B

Section 1.204a of Title 18, Oklahoma Statutes Annotated.

"Rights and remedies against foreign corporations—Service

"(a). The Legislature hereby declares its intention to provide that persons, now having or hereafter having a cause to action against foreign corporations which are doing or have done business in the State of Oklahoma, shall have the same procedural rights and remedies in pursuing their cause of action, as were available to such persons prior to August 7, 1947, which date was the effective date of the Business Corporation Act, the same being Chapter A, Title 18, Oklahoma Session Laws 1947.

(b) In all cases where a cause of action has accrued or shall accrue to any person by reason of a foreign corporation doing business in this State, or having done business in this State, and such foreign corporation has removed or withdrawn from this State prior to August 7, 1947, service of summons or other process may be had upon the Secretary of State, and such service shall be sufficient to give jurisdiction of the person to any court in this State having jurisdiction of the subject matter whether sitting in the County where the Secretary of State is served or elsewhere in the State. Within three (3) days after such service upon the Secretary of State as aforesaid, it shall be the duty of the Secretary of State to notify such foreign corporation thereof by registered letter, (with request for return receipt) directed to such corporation at its office as shown by the articles of incorporation or charter or by the latest information officially filed in the office of the Secretary of State, in which letter shall be enclosed copy of the process or other papers served, and it shall be the duty of the plaintiff in any action in which said process shall be issued to pay to the Secretary of State for the use of the State, the sum of Three Dollars ($3.00) which shall be taxed as part

of the taxable costs in said suit if plaintiff prevails therein. The Secretary of State shall keep a book to be called "Process Book" in which shall be recorded alphabetically, the name of the plaintiff and defendant therein, the title of all cases in which processes have been served upon him, the text of the process so served and the return thereof, and the date and hour when such service was made.

(c) The provisions of this Section shall be cumulative to existing laws. Laws 1949, p. 125, Sec. 20.

In all cases where a cause of action has accrued or shall accrue to any person by reason of a foreign corporation doing business in this state or having done business in this state or while a foreign corporation was doing business within this state and such foreign corporation has no registered agent in this state upon whom service of summons or other process may be had, an action may be filed against such foreign corporation in any county in the state and service of summons or other process may be had upon the Secretary of State, and such service shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject matter whether sitting in the county where the Secretary of State is served or elsewhere in the state. As amended Laws 1961, p. 197, Sec. 1. Effective Oct. 27, 1961."

APPENDIX C

Article 9, Section 43 of the Constitution of the State of Oklahoma:

"Foreign corporations—Conditions of doing business—Service—Place of suit:

No corporation, foreign or domestic, shall be permitted to do business in this State without first filing in the office of the Corporation Commission a list of its stockholders, officers, and directors, with the residence and postoffice

address of, and the amount of stock held by each. And e
foreign corporation shall, before being licensed to do
ness in the State, designate an agent residing in the S
and service of summons or legal notice may be had on
designated agent and such other agents as now are or
hereafter be provided for by law. Suit may be maint
against a foreign corporation in the county where an
of such corporation may be found, or in the county o
residence of plaintiff, or in the county where the cau
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Office-Supreme Court, U.S.
FILED
JUN 11 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 77

FEDERAL CARTRIDGE CORPORATION, *Appellant*,

v.

THE SUPERIOR COURT OF CREEK COUNTY, BRISTOW DIVISION, THE HONORABLE G. B. CORYELL, FRED ESPY, and GENE SEARS, *Appellees*.

On Appeal From the Supreme Court of Oklahoma

MOTION OF APPELLEE FRED ESPY TO DISMISS THE APPEAL

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IN THE

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No. 1101

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On Appeal From the Supreme Court of Oklahoma

MOTION OF APPELLEE FRED ESPY TO DISMISS THE APPEAL

As authorized by this Court's Rule 16, Appellee Fred Espy herewith respectfully moves this Court to dismiss Federal Cartridge Corporation's asserted appeal as of right herein, on the following grounds:

I. The history of this litigation

In this asserted appeal as of right, the appellant Federal Cartridge Corporation challenges the constitutionality of an Oklahoma venue statute (Title 18 O.S.A. 1.204(a)). This venue statute deals specially

with foreign corporations which are doing business in Oklahoma, but which have failed to comply with Oklahome's statutory requirement that these corporations appoint a registered agent upon whom service of summons or other process may be had. As to such delinquent foreign corporations illegally doing business in the state, the venue statute provides that they may be sued in any County in Oklahoma, after service upon Oklahoma's Secretary of State. It should be emphasized that there are no such broad venue provisions in Oklahoma's laws with respect to foreign corporations which have properly qualified to do business in the state.

It is Federal Cartridge's primary contention that the aforesaid special venue statute violates the equal protection clause of the Fourteenth amendment to the U. S. Constitution, by providing a far greater range of venue for foreign corporations illegally doing business in Oklahoma than is provided in other statutes of the state for domestic corporations, and for foreign corporations properly domesticated. Federal Cartridge asserts a right to challenge Oklahoma's special venue statute because, under the broad provisions thereof, Federal Cartridge has been sued by Fred Espy in an Oklahoma county where it could not have been sued, had it been a properly domesticated foreign corporation.

The factual premises underlying Federal Cartridge's contention should be made clear at the outset, beyond peradventure of doubt. Federal Cartridge's assertion in the instant Statement as to Jurisdiction that (p. 8) "it is not doing business within the State of Oklahoma" does not reflect an established fact of

record, nor does it reflect a jurisdictional issue raised and decided below. The sole issue raised by Federal Cartridge in the Oklahoma Supreme Court was whether or not Oklahoma could subject Federal Cartridge to suit in a county where venue would not lie against a domestic corporation or a foreign corporation legally doing business in the state. This was a justiciable issue only upon the factual predicates that (1) Federal Cartridge, a Minnesota corporation, was doing business in Oklahoma; and (2) Federal Cartridge had failed to meet Oklahoma's statutory requirements for doing such business in the state.

Hence, it is irrelevant here—as it was in the Supreme Court of Oklahoma—that Federal Cartridge alleged in various pleadings below, in ambiguous and conclusional terms, that it was not doing business in Creek County, where appellee Fred Espy filed his damage suit; and that it was not doing such business in Oklahoma as would require it to qualify to do business there. In this connection it may be noted that, although Fred Espy as respondent in the proceedings in the Supreme Court of Oklahoma sought to show on brief (R. 39 et seq.) that Federal Cartridge was doing business in Oklahoma under applicable statutes and legal concepts, the corporation expressly declined in its Reply Brief (R. 63 et seq.) to join issue on this point.

In any event, Federal Cartridge's standing to challenge the special venue provisions of Title 18 O.S.A. 1.204(a) is necessarily predicated upon the fact or assumption that it *was* doing business in Oklahoma at all pertinent times, but that (as conceded by Federal Cartridge in an affidavit annexed to its first motion in the trial court (R. 15)) the corporation "is not admitted to do business in the State of Oklahoma."

II. The asserted violation of the Fourteenth Amendment to the Constitution is not an issue cognizable by this Court in an appeal as of right

In an asserted appeal as of right, as this Court said in *Republic Gas Co.* v. *Oklahoma,* 334 U.S. 62, 70-71, "Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction." And where, as here, the asserted appeal draws in question the constitutionality of a state statute, appellant must satisfy this Court that the constitutional issue was timely raised below. More particularly, if the issue was raised for the first time in the supreme court of a state, as it was here, appellant must establish affirmatively that the contention was timely under the local laws and practice. *Memphis Natural Gas Co.* v. *Beeler,* 315 U.S. 649, 651.

In the case at bar, as appears from the transcript of record docketed in this Court, Federal Cartridge did not raise any question of constitutionality in the trial court; the equal protection clause of the Fourteenth Amendment was invoked for the first time in the Supreme Court of Oklahoma.* It follows, under the above authorities, that appellant has the affirmative burden of showing that the constitutional question was timely raised under the local laws and practice. Federal Cartridge has not even attempted to make such a showing in its Statement as to Jurisdiction.

A related requirement for the establishment of this Court's jurisdiction over appeals as of right is that appellant affirmatively show that the highest court of

* The issue appellant attempts to raise here with respect to compliance with the Constitution of Oklahoma was raised for the first time in appellant's Petition for Rehearing in the Supreme Court of Oklahoma (R. 71). This issue is dealt with below.

the state deemed the constitutional question to be in issue (*Memphis Natural Gas Co.* v. *Beeler, supra,* p. 651), and expressly passed on it (this Court's Rule 16.1(b)). In the instant case, it may be noted that the orders entered by the Supreme Court of Oklahoma denying Federal Cartridge's application of a writ of prohibition (R. 70, 95) give no reasons whatever for the action taken. Thus it cannot be known whether the Supreme Court of Oklahoma deemed the Fourteenth Amendment question to be in issue, and intended to adjudicate the question by its orders.

Finally, appellant has the considerable burden in asserted appeals as of right of showing affirmatively that the constitutional question is "substantial". The mere reference to a provision of the Federal Constitution, or the mere assertion of a claim under it, does not automatically confer jurisdiction upon this Court. *Sugarman* v. *United States,* 249 U.S. 182, 184. This Court conceives it to be its "duty to decline jurisdiction whenever it appears that the constitutional question presented is not * * * substantial in character." *Zucht* v. *King,* 260 U.S. 174, 176. Accordingly, the Rules of this Court require an affirmative showing of substantiality in the appellant's Juridictional Statement (Rule 15.1(e)), and authorize a motion to dismiss on the ground *inter alia* that the asserted appeal "does not present a substantial federal question" (Rule 16.1(b)).

Again, appellant has failed to discharge its affirmative burden of establishing jurisdiction. The section of its Statement as to Jurisdiction devoted to the contention that "The Federal Question is Substantial" (pp. 7-16) attempts to magnify the issue by implying that all foreign corporations doing business in Okla-

homa are affected. This is not the case. As set forth above, the special venue statute involved applies only to foreign corporations illegally doing business in Oklahoma—not to foreign corporations which have properly qualified to do business in the state. Appellant has not shown, or attempted to show, that there is a large class of foreign corporations illegally doing business in Oklahoma. Moreover, appellant takes no account of the powers of the state to police and penalize such corporations.

In *Zucht* v. *King, supra,* this Court held that a "substantial" federal question was not presented because the state law involved was obviously within the police powers of the state. More to the point here is *Interstate Amusement Co.* v. *Albert,* 239 U.S. 560. There the appellant sought to challenge a Tennessee statute which penalized foreign corporations illegally doing business within the state by providing that any contracts entered into in Tennessee by such foreign corporations were null and void, and could not be enforced by such foreign corporations in the courts of Tennessee. This Court held that (p. 170) "The insistence based upon the "equal protection" clause is *unsubstantial,* and calls for no discussion." [Emphasis supplied].

As this Court said in *International Shoe Co.* v. *Washington,* 326 U.S. 310, 319:

> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which re-

quires the corporation to respond to a suit brought to enforce them, can, in most instances, hardly be said to be undue.

III. The issue appellant attempts to raise with respect to the Constitution of Oklahoma is not a federal question, and in any event was untimely raised below

In addition to invoking the equal protection clause of the Fourteenth Amendment, appellant attempts to raise a second issue in its Statement as to Jurisdiction (p. 4) as to compliance with the Constitution of Oklahoma. This contention merits little discussion.

A state court decision is, though it grounds are not indicated, binding on this Court so far as state law is concerned. *Williams* v. *Kaiser,* 323 U.S. 471. Insofar as the decision of a state court involves construction of the state's constitution and laws, it is not reviewable by this Court; compliance *vel non* with a state's constitution is not a federal question. This is settled by many decisions of this Court, including *Southern R. Co.* v. *Wright,* 151 U.S. 470, *Atchison T. & S. F. R. Co.* v. *Railroad Commission,* 283 U.S. 380, and *Screws* v. *U. S.,* 325 U.S. 91.

Moreover, it is well-settled under Oklahoma law that an issue raised for the first time on a petition for rehearing is untimely, unless it goes to the jurisdiction of the court in which the petition for rehearing is filed or unless extraordinary circumstances mitigate the failure to raise the issue earlier. *Brown* v. *State Election Board,* 369 P. 2d 140, 151 (Okla.); *accord, Reed* v. *State Election Board,* 369 P. 2d 156 (Okla.).

CONCLUSION

Upon all of the foregoing grounds, appellee Fred Espy respectfully moves this Court to dismiss the asserted appeal as of right herein.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 11th day of June, 1964, in compliance with this Court's Rule 33.3(b), I mailed a copy of the foregoing motion, airmail postage prepaid, to James H. Ross, Esq., at his last-known office address, 1415 First National Building, Oklahoma City, Oklahoma, and further that I mailed a copy of the foregoing motion, postage prepaid, to John L. Laskey, Esq., at his last-known office address, 1025 Connecticut Avenue, Washington, D. C.

GRANT W. WIPRUD
Counsel for Appellee
Fred Espy

[redacted]

[redacted]

[redacted]

IN THE

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v.

THE SUPERIOR COURT OF CREEK COUNTY, BRISTOW DIVISION, AND THE HONORABLE G. B. CORYELL, Judge of said Court, and FRED ESPEY AND GENE SEARS, *Appellees.*

Appeal from the Supreme Court of Oklahoma

APPELLANT'S BRIEF IN OPPOSITION TO MOTION OF APPELLEE FRED ESPEY TO DISMISS THE APPEAL

Appellee in his motion to dismiss contends that appellant's challenge to the Oklahoma Venue Statute, Title 18, Sec. 1.204 (a), Okla. Statutes Annotated (set forth in full in Appendix B of appellant's jurisdictional statement herein and hereinafter called "Oklahoma Venue Statute") upon the ground that the Venue Statute as applied to appellant constitutes a denial of

the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States, "is not an issue cognizable by this Court in an appeal as of right." (page 4 of appellee's motion). This contention is based upon appellee's assertion that:

(1) The Constitutional issue was not timely raised below; and

(2) The Constitutional question is not substantial.

These propositions will be discussed in order below.

I.

The Constitutional Question Was Raised in a Timely Manner in the Original Proceeding in the Oklahoma Supreme Court

Appellee's statement that appellant did not raise the constitutional question in the "trial court" (by which term appellee presumably means the Superior Court of Creek County) is irrelevant and is based upon a misconception of the nature of the proceedings of which appellant now seeks review. Under the law of the State of Oklahoma an application for a writ of prohibition against an inferior court in a civil proceeding must be brought in the Supreme Court of Oklahoma. *State* v. *Langmire*, 281 P. 2d 949 (Okla., 1955). Article VII, Sec. 2 of the Oklahoma Constitution under which appellant brought its application for a writ of prohibition clearly indicates that the issuance of such writs is within the original, as distinguished from the appellate, jurisdiction of the Oklahoma Supreme Court. In *State* v. *Caldwell*, 181 P. 2d 843 (Okla. Ct. App. 1947), the Court, in ruling upon an application for a writ of prohibition, poted that "this is an original proceeding" and pointed out that a writ of prohibition being in effect an injunction against the exercise of judicial power, "lies only as between courts which

sustain to each other the relation of superior and inferior". 181 P. 2d at 845.

In the case at bar the appellant, in the original proceeding in the Oklahoma Supreme Court, argued at some length that the Oklahoma Venue Statute constituted a violation of the Fourteenth Amendment of the Federal Constitution as applied to the appellant corporation (R. 28-34). Appellee, in its reply brief in the Oklahoma Supreme Court, made no attempt to challenge appellant's standing to raise the Constitutional issue but met this issue squarely and argued that the Oklahoma Venue Statute did not deprive appellant of equal protection of the laws under the Fourteenth Amendment. (R. 51-61). Accordingly, the Constitutional issue was properly before the Oklahoma Supreme Court in the original proceeding for a writ of prohibition. Even if appellee had challenged appellant's right to raise this issue in the Oklahoma Supreme Court, such challenge would have been unsuccessful because under the Oklahoma Law it is well-established that one seeking a writ of prohibition must simply call to the attention of the lower court its lack of jurisdiction. *Rogers* v. *Douglas*, 181 Okla. 32, 72 P. 2d 823, 826 (1937); *State* v. *Curry*, 208 Okla. 511 257 P. 2d 799 (1953). Appellant, in the proceeding in the Superior Court of Creek County, raised the venue issue (R. 15) and accordingly such issue was properly before the Supreme Court of Oklahoma which is, on an application for a writ of prohibition, the Court of first instance.

Appellee further argues that appellant must show that the Supreme Court of Oklahoma "deemed the Constitutional question to be in issue * * * and expressly passed on it." (Appellee's motion, page 5).

The case cited by appellee, *Memphis Natural Gas Company* v. *Beeler*, 315 U. S. 649, 86 L. ed. 1091 (1942) does not support this contention. In that case the appellant had not raised the Constitutional issue in a timely manner in the trial court nor had the Supreme Court of Tennessee passed upon this issue. In an opinion by Mr. Chief Justice Stone, this Court held:

> "Since it does not appear that the validity of the statute was *either* drawn in question *or* passed upon in the trial court *or* deemed by the State Supreme Court to be an issue, we must dismiss the appeal for want of jurisdiction." 315 U. S. at 651, 86 L. ed. at 1094 (Emphasis added).

The requirements that the Constitutional issue be expressly passed upon by the State court or that the highest court of the state must deem the Constitutional question to be in issue are stated in the disjunctive clearly indicating that such requirements become relevant only whre the Constitutional issue is not raised in a timely manner under State procedures. This same disjunctive phraseology of such requirements is found in Rule 16.1 (b) of the Rules of this Court. As noted above, the Constitutional issue was raised in a timely manner by the appellant in its original proceeding for a writ of prohibition in the Supreme Court of Oklahoma and therefore the question of whether such court expressly passed upon the Constitutional issue or deemed such issue to be before it is irrelevant. To hold otherwise would give to a state court the power absolutely to cut off a litigant's right of appeal to this Court by simply failing to indicate the basis for its ruling as was done here by the Oklahoma Supreme Court in its denial of appellant's application for a writ of prohibition. (pages ii and iii, Appendix to Jurisdictional Statement). Such a result would empower

state courts to nullify the remedy of appeal to this Court provided by 28 U.S.C.A. 1257(2).

Appellant has done all that it can properly to raise the Federal Constitutional issue in the original proceeding in the Oklahoma Supreme Court. Accordingly, this issue is properly before this Court.

2.

The Constitutional Question Raised by This Appeal is Substantial

Appellee states that the appellant corporation is "illegally doing business in Oklahoma." (Motion page 2). Such assertion is not founded on any facts in the record and indeed the appellant has consistently maintained the position that it does not do business, illegally or otherwise, in the State of Oklahoma. Appellee's position is apparently that the mere assertion by a plaintiff that a foreign corporation is doing business in Oklahoma together with the admitted fact that such corporation, believing in good faith that it does not do business in Oklahoma, has not domesticated itself under the laws of Oklahoma makes the corporation an outlaw beyond the protection of the Fourteenth Amendment. Not surprisingly, no cases are cited which even remotely support such a proposition.

It should further be noted that the practical operation of the Oklahoma Venue Statute is such that the burden of having to appear and defend a lawsuit in any one of the states seventy-seven counties (regardless of whether that county has any relation whatever to the plaintiff, the defendant, or the cause of action) is imposed upon a foreign corporation before a judicial determination may be made as to whether such cor-

poration is, in fact, doing business in Oklahoma. Thus, even on the "outlaw" theory advanced by the appellee, the punishment comes before there has even been a judicial determination of whether such punishment is proper.

Appellant concedes that the case of *Power Manufacturing Company* v. *Saunders*, 274 U. S. 490, 71 L. ed. 1165 (1927) differs from the case at bar in that the Arkansas Venue Statute there in issue discriminated against all foreign corporations while the Oklahoma Venue Statue discriminates against foreign corporations sued in Oklahoma by a plaintiff alleging that such corporations do business in Oklahoma and are not domesticated under the laws of that State. The discrimination in the case at bar is, however, equally unreasonable. The concept of what constitutes "doing business" is exceedingly subtle and complex and is susceptible to no hard and fast rule. *International Shoe Company* v. *Washington*, 326 U. S. 310, 319, 90 L. ed. 95, 103-104, (1945). The Oklahoma Venue Statute, in effect, requires a foreign corporation to make this difficult determination and, as a penalty for a corporation's good faith determination that it does not do business in Oklahoma, to be subject to suit in any one of the seventy-seven counties in the State, irrespective of whether there is any relationship between such county and any of the litigants or the cause of action itself. No reasonable basis exists for such discrimination and, significantly, none has been indicated by the appellee other than applying to such corporations the epithet "illegal".

Such discrimination against certain foreign corporations by a state statute clearly presents a substantial

Federal Constitutional question.* In *Power Manufacturing Company* v. *Saunders, supra*, this Court held that an Arkansas Venue Statute similarly discriminating against foreign corporations violated the Fourteenth Amendment. The question of whether the Oklahoma Venue Statute falls within the ambit of this Court's holding in *Power Manufacturing Company* is thus squarely presented by this appeal and should be passed upon by this Court.

CONCLUSION

For the reasons set forth herein and in the Jurisdictional Statement previously filed, appellant submits that this appeal presents a substantial Federal Constitutional question which requires the presentation and consideration of briefs and oral argument for its resolution.

Respectfully submitted.

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*Appellee suggest on pages 5-6 of his motion that the substantiality of a federal question presented to this Court is somehow dependent upon the number of persons affected and that if only a small number of persons are deprived of equal protection of the laws then the federal question is not "substantial." No authority is cited in support of this statistical test of substantiality.

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